

facility. Whatever the reason for their choice, these carriers have chosen to use special access and apparently have found it to be a competitive option.

74. In addition, carriers may obtain access on a wholesale basis from other fiber providers. AT&T admits that it identified about 3,000 circuits to “‘roll’ from ILEC special access to CLEC facilities” this year. (Fea and Giovannucci ¶80 n. 24)
75. Second, some commenters propose that the Commission continue to rely on the triggers proposed in the *Triennial Review Order*. (ALTS, p. 4, 62; Loop and Transport CLEC Coalition, p. 114; Sprint, p. 28) As I have already described, these triggers are flawed in their practical application, involve the ability to “game” the system, and focus on an improper inquiry. ALTS takes this last point to an illogical extreme, arguing that the Commission should consider only the actual deployment since a particular entry barrier may be significant at any particular location. (p. 65) In addition to contravening the Telecommunications Act of 1996, as interpreted by the D.C. Circuit, this proposal has all of the problems associated with AT&T, MCI, and McLeod proposals, which are addressed below.
76. AT&T (p. 27), MCI (p. 126), and McLeod (p. 17) propose that the Commission’s ruling in the *Triennial Review Order* that carriers are not impaired for loop facilities where they require more than 2 DS3s of capacity is a sufficient recognition of where carriers are not impaired. This test is not only location-specific, but also carrier-specific. As explained above, the Act is designed to ensure competition – not to ensure that every carrier can supply services at every location. In addition, it does not take into account the potential for self-deployment or wholesaling of facilities.

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77. As described in my affidavit, BellSouth's proposal for a proxy test to show competition in the loop market is the number of business access lines in a central office. In my affidavit, BellSouth's reasons for this proxy and the examination of the appropriate number were detailed. I will describe here why BellSouth believes 5,000 business access lines in a central office is both reasonable and appropriate. As with transport, I will show the differences in characteristics of central offices with fewer than and at least 5,000 business lines by looking at the analysis by grouping central offices in increments of 5,000 business lines. The distinction between the characteristics of central offices with at least 5,000 business lines and those of central offices with fewer than 5,000 business lines is clear.
78. Table 5 shows the difference between the concentration of CLEC lit buildings in central offices with less than 5,000 business lines (only 14.5% in 72.7% of all the central offices) and the concentration in those central offices with just 5,000 to 10,000 business lines (29.3% versus 12.6% of the total number of central offices). Almost half of all the central offices with known CLEC lit buildings have between 5,000 and 15,000 business lines.

Central Office by No. of Business Access Lines	Percent of Central Offices with Known CLEC Lit Buildings	Percent of Central Offices
Below 5,000	14.5%	72.7%
5,000-10,000	29.3%	12.6%
10,000-15,000	17.4%	6.0%
15,000-20,000	14.5%	3.6%
20,000-25,000	9.3%	2.0%
25,000-30,000	6.1%	1.3%
30,000-35,000	2.9%	0.6%
35,000-40,000	1.0%	0.2%
40,000-45,000	1.0%	0.2%
45,000-50,000	1.3%	0.3%
Above 50,000	2.9%	0.6%

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**Table 5**

79. Table 6 shows that 92.4% of the central offices with less than 5,000 business lines have at least 50 buildings in which CLECs are using DS1 special access circuits to serve end users. By contrast, 90.8% of the central offices with between 5,000 and 10,000 business lines have *more than* 50 buildings in which CLECs are using DS1 special access circuits to serve end users. At each increment in the sizes of central offices, the percentage of central offices with more than 50 buildings in which CLECs are using DS1 special access circuit to serve end users is very high. However, in central offices with at least 40,000, CLECs no longer appear to use special access services in this way. In the largest central offices, then, CLECs are apparently using non-ILEC facilities to provide high-capacity services to these end users.

Central Offices by No. of Business Access Lines	Number of Buildings Served by CLECs using SpA to Serve End Users			
	0	1-20	21-50	51+
Below 5,000	16.9%	59.4%	16.2%	7.6%
5,000-10,000	0.0%	0.0%	9.2%	90.8%
10,000-15,000	0.0%	0.0%	1.1%	98.9%
15,000-20,000	0.0%	0.0%	0.0%	100.0%
20,000-25,000	0.0%	0.0%	0.0%	100.0%
25,000-30,000	0.0%	0.0%	0.0%	100.0%
30,000-35,000	0.0%	0.0%	0.0%	100.0%
35,000-40,000	0.0%	0.0%	0.0%	100.0%
40,000-45,000	NA	NA	NA	NA
45,000-50,000	NA	NA	NA	NA
Above 50,000	NA	NA	NA	NA

**Table 6**

80. Table 7 shows that central offices with fewer than 5,000 business lines account for considerably lower levels of special access revenues. For example, only 12.1% of the central offices with fewer than 5,000 business lines had special access revenues

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from CLECs serving end users that were in excess of \$200,000 annually. By contrast, more than 85% of the central offices with between 5,000 and 10,000 business lines and nearly 97% of those with between 10,000 and 15,000 business lines had special access revenues from CLECs serving end users that exceeded \$200,000 annually. The differences at every level at the 5,000 business line break point are dramatic.

Central Offices by No. of Business Access Lines	Annual Special Access Revenues from CLECs Serving End Users						
	<\$100K	\$100K+	\$200K+	\$400K+	\$600K+	\$800K+	\$1M+
Below 5,000	72.3%	27.7%	12.1%	2.0%	0.6%	0.3%	0.1%
5,000-10,000	5.5%	94.5%	85.4%	52.8%	26.6%	13.1%	6.0%
10,000-15,000	1.1%	98.9%	96.8%	85.1%	62.8%	39.4%	27.7%
15,000-20,000	0.0%	100.0%	100.0%	92.9%	80.4%	69.6%	60.7%
20,000-25,000	0.0%	100.0%	100.0%	93.8%	84.4%	75.0%	65.6%
25,000-30,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	85.0%
30,000-35,000	0.0%	100.0%	100.0%	100.0%	100.0%	88.9%	88.9%
35,000-40,000	0.0%	100.0%	100.0%	100.0%	100.0%	66.7%	66.7%
40,000-45,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
45,000-50,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Above 50,000	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

**Table 7**

81. Until reaching the highest levels of revenue in Table 7, the greatest difference in every variable at every level examined happens at the 5,000 business line level. Given the need for a simplified test and that these items all show the presence of existing competition or indicate that competition is possible and that there is a clear break point in the characteristics of central offices at the 5,000 business line level, the Commission should find that CLECs are not impaired without access to unbundled high-capacity loops from any central office with 5,000 or more business lines.

**Dark Fiber**

82. Some commenters have proposed tests similar to their transport and loop test proposals to apply to dark fiber. When carriers deploy fiber, they deploy far more strands of fiber than they currently need. This is because the incremental cost of deploying additional strands is very low. In other words, where fiber exists, there is also dark fiber. If carriers are not impaired without access to lit fiber, of any sort, then they cannot be impaired without access to the dark fiber. The Commission should consider the evidence presented above and find that carriers are not impaired without unbundled access to dark fiber in central offices with more than 5,000 business lines.
83. Alpheus (p. 31) and ALTS (p. 67) argue that lit fiber is not a substitute for dark fiber. However, as CompTel points out, it is a "...commonsense notion that dark fiber is operationally the same as lit fiber..." (p. 32) The use of dark fiber is a different business proposition for the requesting carrier, so Alpheus and ALTS are correct that their business model may not work with access to only lit fiber. However, as Alpheus notes, the deploying carrier has every incentive to make the dark fiber available to requesting carriers, because the "rates represent 100% pure profit as the element otherwise lays dormant, unused by anyone." (p. 10) This applies no matter who the deploying carrier is. Covad affiants Derodeff, Bennett, and Richman confirm that wholesale alternatives are available. "...Covad has obtained dark fiber from alternative wholesale providers in the few instances it has undertaken such deployments." (p. 27)

**Entrance Facilities**

84. In the *Triennial Review Order*, the Commission redefined dedicated transport such that inter-network connections are no longer considered UNEs. The DC Circuit Court remanded this decision to the Commission primarily on the grounds that the Commission did not adequately explain its reasoning. Several commenters in this proceeding have urged the Commission to revisit its decision and require ILEC to provide entrance facilities as UNEs, either via the transport decision or by requiring entrance facilities as a separate network element subject to the loop triggers (Alpheus, p. 73). There is no basis for such a requirement. The market for entrance facilities may be the most competitive market in the industry. AT&T repeatedly admits in its comments that CLECs primarily deploy fiber optic facilities to transport traffic between ILEC central offices and the CLEC's switch. (for example, p. 43, 79)
85. Further, entrance facilities are, in almost every case, new facilities. There is no reason to require ILECs to assume the risk of deploying stranded facilities for requesting carriers who have not "achieved traffic volumes such that self-deployment of entrance facilities becomes efficient" (ALTS, p. 90) – at least not without allowing the ILEC to set its prices to account appropriately for the risk. As discussed in my affidavit, for new facilities, ILECs and CLECs are equally capable of deploying facilities and face the same issues with deployment.

**Enhanced Extended Loops (“EELs”)**

86. Carriers argue that EELs, particularly DS1 EELs, should be available as a separate network element found to be a element for which the Commission should find nationwide impairment out of hand (Loop and Transport CLEC Coalition, p. 76, McLeod p. 22-24) or pursuant to triggers similar to those chosen by the Commission for transport and loops (ATX *et al.*, p. 24-25). The Commission should reject this notion. Without question, an EEL is a combination of individual elements – both of which are addressed by the Commission’s rules separately. There is no reason to address them together. If a carrier is not impaired without access to one or both “piece parts” of an EEL, then simply combining those piece parts does not create impairment.
87. In any event, the Commission should mandate that there will be no conversion of EELs, or any special access elements, to UNEs. Carriers have had the ability to order UNEs since 1996 and EELs since 2000. Carriers made the choice to order special access services. (In BellSouth’s region, nearly 87% of all DS1 loop and transport combinations are purchased as special access, while over 99% of all DS3 loop and transport combinations are purchased as special access. When BellSouth’s three largest interexchange carrier customers are removed from the totals, these percentages decrease to 62% of the DS1 loop/transport combinations and 98% of DS3 loop/transport combinations.) In addition, if a carrier has been using special access to provide service to an end user, the carrier is obviously not impaired without it. Indeed, fully 99% of all DS1 and DS3 loop/transport combinations

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provisioned by BellSouth to its three largest interexchange carrier customers are provisioned as special access circuits.

88. Carriers are also urging this Commission to remove all use restrictions from EELs. (AT&T, p. 135) The Commission should refuse to be misled by the CLECs' claims. Interexchange and CMRS carriers are not impaired without access to EELs, or other UNEs. Nor are CLECs impaired in offering these services without such access. As the D.C. Circuit made clear, absent a finding of impairment, there can be no unbundling requirement.
89. First, no impairment analysis has been done with regard to either CMRS or interexchange services. However, given the long-standing use of special access to provide these services and the long history of strong competition in these markets, no impairment could possibly be found for either service. CMRS providers (Sprint; T-Mobile) have not provided any evidence to overcome the strong presumption of wireless non-impairment that permeates *USTA II*. Rather these carriers again claim that they are impaired simply because of the possibility of providing the services they seek to provide at a lower cost than they have previously been able to access. (Selwyn p. 84) There is no basis for impairment in this argument. The courts have clearly noted that increased cost does not constitute impairment and in this case, the costs will not be increased at all, but rather will stay the same as they have always been.
90. Further, this issue has been addressed by the courts as well as by the Commission in the TRO, the record compiled in the context of the four wireless petitions for



reconsideration of the Triennial Review Order,<sup>1</sup> and in the record established in this proceeding.<sup>2</sup> In all of these cases, it has been made clear that impairment does not exist with respect to CMRS services.

91. In light of the fact that carriers are not impaired without access to UNEs when seeking to provide wireless and/or interexchange services, the Commission should ensure that UNEs are not abused for the provisioning of these services. In the TRO, the Commission chose to remove the use restrictions it had placed on EELs. The Commission should reinstitute these requirements as measuring the usage is the only means of determining how the facilities are actually being used. The Commission's architectural requirements only address how a facility *could* be used.
92. AT&T claims that the service eligibility requirements in the *Triennial Review Order* prevent carriers from providing private line services via EELs. (p. 144) However, it does not appear that other carriers are in any way impaired with regard to providing these services. The Yankee Group (March 2004, *Wholesale Transport Services Survey Summary Shows Rising Demand*, by J.P. Gownder) reports that interexchange carriers are the preferred carrier for these types of services in the wholesale market. CLECs are the provider of choice for 8% of respondents and the next preferred provider in an additional 16%.

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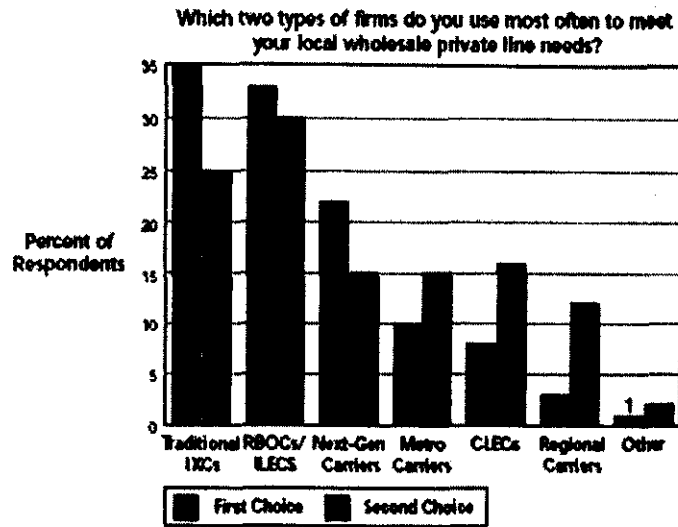
<sup>1</sup> Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Public Notice, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003). This record has in turn been incorporated into this proceeding. *Notice*, ¶ 12

<sup>2</sup> BellSouth Comments at 63-66, BellSouth App. Tab 32 (Reply Declaration by National Economic Research Associates, Inc., "Claim: CMRS Providers are Impaired Without the Availability of Dedicated Transport on a UNE Basis" (July 17, 2002) ("NERA 2002 CMRS Impairment Analysis")); SBC Comments at 22-24 ("As the D.C. Circuit has recognized, the overwhelming evidence of remarkable growth and robust competition in the wireless industry without access to UNEs demonstrates that there is no lawful basis to find impairment or impose unbundling in that market); Verizon Comments at 71-74. *UNE Fact Report 2004* § II.B.1.

**Exhibit 8.**

**IXCs and ILECs Are Leading with Options for Metro Private Line**

Source: *The Yankee Group, 2004*



93. The Loop and Transport CLEC Coalition argues that use restrictions are unnecessary because “the Commission should not regulate to solve problems that have not been proven (and cannot at this juncture be proven) to exist.” (p. 121) The Commission has regulated in such circumstances, and indeed, carriers are urging this Commission to do so now with regard to the supposed impairment that interexchange carriers will face when confronted with competing with ILECs in the long distance market. It is also important to note that abuse of the use restrictions from the Supplemental Order Clarification are difficult to prove, given that CLECs have generally refused BellSouth the right to conduct audits to ensure compliance with those restrictions. The Loop and Transport CLEC Coalition fails to note that BellSouth has been granted audit rights as the result of several state complaints and is hopeful of receiving similar rulings in other pending cases. Further, the Loop and

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Transport CLEC Coalition mistakenly implies that BellSouth is not seeking to audit of “legacy IXC[s]”. (p. 121) This is not true. BellSouth has twice initiated audits of MCI’s EELs in the past two years. The first was sidelined due to MCI’s bankruptcy. The second was recently initiated.

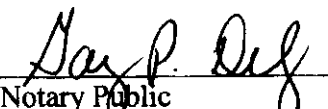
94. This concludes my affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

  
Shelley W. Padgett  
Assistant Director – Regulatory & Policy Support  
Interconnection Services

Subscribed and sworn to before me

This 19<sup>th</sup> day of October, 2004

  
Notary Public

Gay P. Ditz  
Notary Public, DeKalb County  
Georgia  
My Commission Expires  
February 09, 2007